SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 15 | Issue 4 Article 9

1964

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may properly question whether this criticism is expressive of repugnance for the "improper" role of the Court, or of the "humanitarianism" of its decisions.

In any event, the Court has met the problem of legislation which could have been interpreted to defeat a humanitarian doctrine. It has refused to give literal interpretation to the statute to the exclusion of the humanitarian doctrine. This classic example of collision between doctrine and statute has been resolved in favor of contemporary attitudes toward industrial injuries. The humanitarian doctrine has been vindicated.

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Evidence of Criminal History in Ohio Criminal Prosecutions

> Place a man's bad record before the jury and it is almost impossible for them to take an impartial view of the case brought against him. Slight evidence becomes magnified. Every defense is liable to appear suspicious.[1]

Courts[2] and legal writers[3] have traditionally seized upon the above proposition to justify excluding evidence of a defendant's criminal history in a criminal prosecution.[4] However, this exclusionary rule is based on policy rather than logic. Evidence which tends to prove the proposition for which it is introduced is logically relevant. Since trial is a means by which truth is sought, all evidence that serves to aid the triers of fact in arriving at the truth is logically relevant.[5] In this respect, evidence of a person's criminal history is relevant in that it tends to demonstrate habit or disposition to commit crime. Nevertheless, the chance of prejudice to the defendant from an "over-strong" tendency of a jury to believe him

1. Regina v. Farris, [1841] 1 Q.B. 129, 131.

2. See Michelson v. United States, 335 U.S. 469 (1948); People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); Whiteman v. State, 119 Ohio St. 285, 164 N.E. 51 (1928).

3. See MCCORMICK, EVIDENCE § 157 (1954) [hereinafter cited as MCCORMICK §]; 1 WHARTON, CRIMINAL EVIDENCE §§ 232-48 (12th ed. 1955) [hereinafter cited as 1 WHARTON §]; 1 WIGMORE, EVIDENCE §§ 192-94 (3d ed. 1940) [hereinafter cited as 1 WIGMORE §].

For a discussion of the use of criminal history evidence, see generally Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267 (1952); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938); Thomas, *Looking Logically at Evidence of Other Crimes In Oklahoma*, 15 OKLA. L. REV. 431 (1962).

4. A defendant's criminal history may include evidence showing prior convictions, indictments, arrests, police or private suspicions, and investigations or other unpunished offenses.

5. ICC v. Baird, 194 U.S. 25, 44 (1904).

guilty of the crime charged, merely because of his propensity to commit crime, outweighs the logical relevancy of criminal history evidence.[6]

Notwithstanding the general policy, it has been held that criminal history evidence may be admitted if it is *legally*, as well as *logically* relevant. That is, if the state can demonstrate that a defendant's criminal history is relevant for an "additional purpose," other than to show disposition to commit crime, it may be admitted. Such evidence has an "additional purpose" when used (1) to impeach the defendant's credibility as a witness when he testifies in his own behalf, (2) to rebut the defendant's good character when he introduces evidence thereof, and (3) to substantially prove an element of the crime charged.

This note will illustrate the liberal attitude which the Ohio courts have adopted in admitting an accused's criminal history as substantive proof of the crime charged. This attitude can only mean that the courts are not giving full consideration to the accompanying danger of prejudice to the defendant or that they no longer feel prejudice is a controlling ground for exclusion. While the former seems to be true in prosecutions against non-sexual offenders, the latter is true for sexual offenders.[8]

Particular attention will be directed toward cases involving sex offenders in which the greatest liberalization is found. The result is a complete abandonment of the traditional concept of excluding criminal history evidence relevant only to show criminal disposition. However, in order to illustrate the degree of liberalization in prosecutions for both non-sexual and sexual crimes, attention is first directed to criminal history evidence as used to impeach credibility and rebut the defendant's good character.[9]

IMPEACHING DEFENDANT'S CREDIBILITY

It is a well-established rule that when a defendant testifies in his own behalf[10] he thereby puts his character for "truth and veracity" into issue, subjecting himself[11] to the same test of credibility as any other witness.[12]

6. Among other policy reasons listed by courts and writers are: (1) the right of defendant to be tried only for the crime charged, (2) the right of defendant to be free from surprise and to prepare a defense only for the crime charged, (3) that the evidence of criminal history confuses the jury and diverts attention from the real issue, and (4) that the state is not entitled to attack defendant's character until he offers evidence of his good character. See generally 1 JONES, EVIDENCE § 162 (5th ed. 1958); 1 WHARTON § 232, at 497 (citing authorities); 1 WIGMORE § 194.

7. Whiteman v. State, 119 Ohio St. 285, 164 N.E. 51 (1928).

8. See notes 72-77 *infra* and accompanying text.

9. See note 11 *infra.*

10. OHIO REV. CODE § 2945.43 provides: "a person charged with an offense may, at his own request, be a witness, but not otherwise." Thus, the state is prohibited from compelling defendant to testify. See State v. Hickman, 102 Ohio App. 78, 141 N.E.2d 202 (1956) (discussing § 2945.43).

11. Defendant also *subjects himself* to exposure of his criminal history when he offers character evidence. But until he does so, the prosecution is precluded from attacking his

Thus, on cross examination, the prosecutor may attempt to impeach a defendant's credibility[13] by showing his criminal history.[14]

Fortunately, however, most legislatures and courts impose restrictions on the prosecutor's use of such evidence. In Ohio, for example, the prosecution may use only a small portion of a defendant's criminal history, namely, his prior convictions.[15] Evidence of prior indictments,[16] arrests,[17] and the like are not admissible for such purposes. Moreover, inquiry as to prior convictions is limited to the number of convictions sustained and the name and nature of the crime involved. Questions directed at details and incidents of the crime are excluded.[18]

These limitations serve the further purpose of minimizing the ever present danger of jury prejudice. The theory is that the jury should be exposed only so long and in such depth as is necessary. But, it is difficult to understand why the courts adopt such a strict attitude here, yet remain liberal, as will be demonstrated later in this article, when criminal history

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character. However, upon offering character evidence, the defendant denies the policy of the exclusionary rule, thereby leaving the prosecution free to introduce evidence of his *prior conviction.*

It is questionable whether the jury prejudice stimulated by general character evidence in favor of the defendant is outweighed by the adverse prejudice created in rebuttal thereof by the prosecutor. For a discussion of the use of character witnesses see generally Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939).

12. Ohio has removed the common law disqualification of persons convicted of crimes from testifying. OHIO REV. CODE § 2945.42. For a list of states abolishing the disqualification by statute see Ashcraft, *Evidence of Former Convictions*, 41 CHICAGO BAR RECORD 303 n.1 (1960).

13. Simon v. United States, 123 F.2d 80 (4th Cir. 1941); State v. Rodriguez, 110 Ohio App. 307, 169 N.E.2d 464 (1959); State v. Hickman, 102 Ohio App. 78, 141 N.E.2d 202 (1956).

14. Proving prior convictions is one of five ways to impeach credibility. For a discussion of the various other methods see Udall, *Character Proof in the Law of Evidence — A Summary*, 18 U. CINC. L. REV. 283 (1949).

15. OHIO REV. CODE § 2945.42 provides in part: "Such . . . *conviction* . . . may be shown for the purpose of affecting the credibility of such witness." (Emphasis added.) For a judicial criticism of the use of prior convictions to impeach see Ashcraft, *supra* note 12, at 303.

16. People v. Waller, 64 Cal. App. 390, 222 Pac. 171 (1923); Wagner v. State, 115 Ohio St. 136, 152 N.E. 28 (1926); Keveney v. State, 109 Ohio St. 64, 141 N.E. 84 (1923); State v. Barton, 191 N.E.2d 173 (Ohio Ct. App. 1963); *accord*, State v. Spadomi, 137 Wash. 684, 243 Pac. 854 (1926). *Contra*, Eaves v. State, 115 Tex. Crim. 460, 29 S.W.2d 339 (1930) (evidence of prior charges pending against defendant admitted); Baker v. State, 79 Tex. Crim. 510, 187 S.W. 949 (1916) (evidence of prior indictment admitted).

17. Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922). Ohio courts have consistently held it to be prejudicial error for the prosecution to inquire about prior arrests and indictments when it has no proof of a conviction for the incident in question. State v. Cole, 107 Ohio App. 444, 155 N.E.2d 507 (1958) (defendant prejudiced by inquiry without proof of conviction); State v. Kennedy, 72 Ohio App. 462, 52 N.E.2d 873 (1943).

In City of Troy v. Cummins, 107 Ohio App. 318, 322, 159 N.E.2d 239, 243 (1958), the court stated that the proper way to frame an inquiry into past convictions is as follows: "Have you been arrested and *convicted* of a criminal offense?" (Emphasis added.) *Accord*, Michelson v. United States, 335 U.S. 469 (1948).

18. State v. Hill, 111 Ohio App. 257, 165 N.E.2d 241 (1959); *accord*, State v. Aldo, 165 Minn. 440, 206 N.W. 933 (1926). For a discussion on depth of inquiry into past convictions see Udall, *supra* note 14, at 292.

evidence is used to prove an element of the crime charged. Certainly, the same danger of prejudice exists in both cases; and if anything, the danger would be greater in the latter case.

The types of crime for which evidence of prior convictions may be shown, however, are many. As a general rule, the prosecution can introduce evidence of prior convictions of crimes which are felonies under either state or federal law. Likewise, it has been held in some jurisdictions that evidence of prior convictions is admissible if the crime is a misdemeanor under state law. Thus, in *State v. Murdock*,[19] the Ohio Supreme Court defined "crime," as used in section 2945.42 of the Ohio Revised Code,[20] as including "both misdemeanors and felonies under state law."[21] Moreover, one Ohio court has even gone as far as allowing evidence of prior convictions of a municipal ordinance, provided however, that such ordinance is identical to a state statute.[22]

It is doubtful whether convictions for simple misdemeanors or felonies not involving a disposition for perjury, cast any doubt on the defendant's character for truth and veracity. The drafters of the Uniform Rules of Evidence have taken this position by limiting the use of prior convictions to crimes involving dishonesty or false statements, such as perjury, bribery, and forgery.[23]

Trial courts generally give instructions to juries to the effect that prior convictions are to be considered only for impeachment purposes and not upon the question of guilt or innocence.[24] However, jurists and text authorities question a juror's ability to departmentalize evidence according to its limited purposes; it is thought that, at least subjectively, such evidence is given improper weight in deciding the ultimate question of guilt.[25] Furthermore, it is doubtful whether such safeguards as jury instructions combined with the restrictions on prosecutors in using prior convictions,[26] are effective in protecting against this bedrock of prejudice.

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19. 172 Ohio St. 221, 174 N.E.2d 543 (1961).

20. "No person is disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of *crime*. . . ." OHIO REV. CODE § 2945.42. (Emphasis added.)

21. State v. Murdoch, 172 Ohio St. 221, 174 N.E.2d 543 (1961) (syllabus).

22. State v. Hamm, 104 N.E.2d 88 (Ohio Ct. App. 1951). *Contra*, City of Troy v. Cummins, 107 Ohio App. 318, 159 N.E.2d 239 (1958). Because the supreme court has refused to pass on this question, the lower courts remain split. In State v. Reese, 117 Ohio App. 454, 463, 192 N.E.2d 791, 798 (1962), the court, on motion to reconsider, refused to answer the question of whether or not a prior conviction under a municipal ordinance identical to a state statute is admissible. Clearly a conviction under a municipal ordinance not identical to a state statute is inadmissible. Harper v. State, 106 Ohio St. 481, 140 N.E. 264 (1922). Other states admit convictions for "any crime" or "any felony," while a few admit infamous crimes." See MCCORMICK § 43, at 89-91 & nn. 2-10.

23. UNIFORM RULES OF EVIDENCE 21.

24. *E.g.*, State v. Hickman, 102 Ohio App. 78, 141 N.E.2d 202 (1956).

25. Stephens v. State, 252 Ala. 183, 186, 40 So. 2d 90, 93 (1949); Ashcraft, *supra* note 12, at 306.

26. See notes 12-15 *supra* and accompanying text.

CRIMINAL HISTORY EVIDENCE AS SUBSTANTIVE PROOF OF THE CRIME CHARGED

It has been held that the exclusionary rule relating to admissibility of criminal history does not prohibit the state from proving its case, particularly when such evidence is necessary to prove a substantive element of the crime.[27] Generally, whenever a defendant's criminal history tends to directly prove his guilt of the crime charged, it will not be excluded because it also, incidentally, shows his guilt as to other crimes. In this respect, the Ohio courts admit criminal history evidence when it has a "natural tendency to establish the particular fact in issue,"[28] or "tends to show the accused's guilt of the crime charged."[29] The theory is that criminal history, in such a case, is *independently relevant* and, therefore, admissible as substantive evidence.[30] Unlike impeaching credibility or rebutting good character, where defendant alone controls admissibility, criminal history which tends to prove a substantive element of the crime charged may be introduced in the prosecution's case-in-chief.[31]

Relevancy — Section 2945.59

Ohio is among the majority of jurisdictions which have adopted well-defined exceptions to the general rule prohibiting the prosecution from introducing a defendant's criminal history in its case-in-chief.[32] Section 2945.59 of the Ohio Revised Code, commonly called the "similar acts statute,"[33] provides:

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27. State v. Frabutt, 180 N.E.2d 201 (Ohio Ct. App. 1961), *appeal dismissed*, 172 Ohio St. 437, 178 N.E.2d 36 (1961); Bandy v. State, 13 Ohio App. 461 (1921), *aff'd*, 102 Ohio St. 384, 131 N.E. 499 (1921).

28. Boyd v. State, 81 Ohio St. 239, 243, 90 N.E. 355, 356 (1909).

29. State v. Frabutt, 180 N.E.2d 201, 204 (Ohio Ct. App. 1961), *appeal dismissed*, 172 Ohio St. 437, 178 N.E.2d 90 (1961).

30. The supreme court firmly established relevancy as the test of admissibility in Whiteman v. State, 119 Ohio St. 285, 164 N.E. 51 (1928). Some legal writers hold relevancy as the test. See generally 1 WHARTON § 232; 1 WIGMORE § 27.

31. State v. Gilligan, 92 Conn. 526, 103 Atl. 649 (1918), *citing* People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).

32. Ohio and the majority of states follow the so-called "exclusionary rule." The federal courts and a few states follow the so-called "inclusionary rule," admitting other-crimes evidence in all cases except those in which it is relevant solely to show criminal disposition. The leading case discussing the "exclusionary rule" is People v. Molineux, 168 N.Y. 264, 291-94, 61 N.E. 286, 293-94 (1901). For an analysis of both rules see Stone, *The Rule of Exclusion of Similar Facts Evidence: America*, 51 HARV. L. REV. 988 (1938).

Courts and commentators have urged abandonment of the "exclusionary rule" in favor of the positively stated "inclusionary rule." State v. Scott, 111 Utah 9, 175 P.2d 1016 (1947); Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267 (1952). See MODEL CODE OF EVIDENCE rule 311 (1942), adopting the minority rule.

33. This is really a misnomer, since evidence of other crimes wholly different in nature from the crime charged, has been admitted. State v. White, 116 Ohio App. 522, 189 N.E.2d 160 (1962) (evidence of prior immoral acts in child stealing prosecution); State v. Frabutt, 180 N.E.2d 201 (Ohio Ct. App. 1961), *appeal dismissed*, 172 Ohio St. 437, 178 N.E.2d 90 (1961) (evidence of child molesting in prosecution for bribery).

> In any criminal case in which defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act is material, any acts of defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved . . . notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.[34]

This section appears exhaustive on its face. However, an examination of the cases which have applied it indicates that its exceptions are not exhaustive. For example, in *State v. Brown*,[35] the court sustained the lower court's holding that other-crimes evidence establishing the "identity" of the defendant with the crime charged was admissible. The court found the exceptions listed in section 2945.59 inapplicable, but justified its decision on the ground that the statute is merely declaratory of the common law, and that "identity" was a recognized exception at common law. Similarly, in *State v. Ross*,[36] the court stated that section 2945.59 "may not be all-inclusive." Hence, in spite of the listed exceptions, it would seem that the courts look more to whether the evidence is relevant to prove an element of the crime charged, rather than to "pigeon-holing" section 2945.59.

Although no definitive formula has been suggested for ascertaining the relevancy of criminal history evidence, some cases do set out guidelines which are frequently used by the courts in deciding this question. They are: (1) the weight of the evidence in establishing the occurrence of the other crime and the defendant's connection therewith,[37] (2) the nature of the crime charged,[38] and (3) the other evidence in possession of, or available to, the prosecutor to establish a prima facie case.[39] Unfortunately, too often Ohio courts have lost sight of one or more of these guidelines. The result: a defendant's criminal history is admissible only for the purpose of showing his propensity to commit crime.

Acts or Crimes? — Section 2945.59

Unlike using criminal history to impeach credibility or rebut character evidence, the prosecution is *not* limited to prior convictions when using criminal history as substantive proof.[40] Since criminal history is relevant

34. OHIO REV. CODE § 2945.59.

35. 137 N.E.2d 609 (Ohio Ct. App. 1955).

36. 92 Ohio App. 29, 37, 108 N.E.2d 77, 82 (1952), *appeal dismissed*, 158 Ohio St. 248, 108 N.E.2d 282 (1952). See MCCORMICK § 157 suggesting the exceptions are as broad as relevancy.

37. *E.g.*, State v. Whigham, 60 Ohio App. 181, 20 N.E.2d 257 (1938).

38. *E.g.*, State v. Moore, 149 Ohio St. 226, 78 N.E.2d 365 (1948).

39. *E.g.*, State v. Martin, 191 N.E.2d 581 (Ohio Ct. App. 1961).

40. The prosecution, however, is prohibited from using prior convictions under section 2945.59. Only the defendant's "acts" may be shown.

to prove guilt, the acts of defendant are important, not his convictions. But this raises the question of whether the acts must constitute a crime in order to be admissible. Although section 2945.59 speaks in terms of "acts" rather than "crimes," the court, in *State v. Roberts*,[41] stated:

> Acts other than the one charged in the indictment which are admitted for the purpose of showing . . . the . . . [crime] charged must be proven by *substantial* evidence.[42]

In spite of this and similar language by other courts,[43] a real danger exists that evidence of acts not constituting a crime may be admitted. The danger stems from the degree of proof necessary to show the defendant's acts amounted to a crime. In Ohio, the prosecution need not prove beyond a reasonable doubt that defendant's acts constituted another crime.[44] Rather, only "substantial" proof is required.[45] However, the courts have not attempted to define "substantial"; they only suggest that the question is discretionary with the trial court under the facts and circumstances of the individual case.[46] In most cases, testimony by an eye witness to defendant's criminal acts is sufficient.[47] Some Ohio courts, however, go even further, permitting a defendant's prior acts to be shown by evidence of police investigations[48] or police or private suspicions, often not based on direct observation.[49]

A standard of proof less than that of "reasonable doubt" does not provide a sufficient degree of certainty in ascertaining whether the alleged other crime occurred, or defendant's connection therewith. Cer-

41. 131 N.E.2d 665 (Ohio Ct. App. 1955).

42. *Id.* at 669. (Emphasis added.)

43. See note 47 *infra.*

44. Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (1923), *overruling,* Baxter v. State, 91 Ohio St. 167, 110 N.E. 456 (1914), which required the "same degree of proof required in all criminal cases."

45. Scott v. State, *supra* note 44, at 476, 141 N.E. at 19; State v. Robert, 131 N.E.2d 665 (Ohio Ct. App. 1955).

46. Other jurisdictions are not in accord on this problem. State v. Bryant, 97 Minn. 8, 105 N.W. 974 (1905) (excluding evidence of prior arrest). *Contra,* State v. Carroll, 188 S.W.2d 22 (Mo. Sup. Ct. 1945). California has admitted evidence of police observations in People v. Hozakis, 102 Cal. App. 2d 662, 228 P.2d 58 (1951). See 22A C.J.S. *Criminal Law* § 690 (1961).

47. *E.g.,* People v. Knight, 62 Cal. App. 143, 216 Pac. 96 (1923).

48. State v. Haines, 112 Ohio App. 487, 176 N.E.2d 446 (1960), *appeal dismissed,* 171 Ohio St. 198, 168 N.E.2d 289 (1960), *cert. denied,* 364 U.S. 904 (1960) (pick-pocketing prosecution where evidence of a prior police investigation admitted).

49. State v. Shively, 172 Ohio St. 128, 174 N.E.2d 104 (1961). Here defendant was charged with sodomy. A police chief was allowed to testify that his department received other complaints concerning defendant's conduct. Also, defendant's pastor was allowed to testify that defendant "jousled" another boy's hair and "ran his hand" down the boy's back. Other courts have not been as liberal. In State v. Moore, 149 Ohio St. 226, 78 N.E.2d 365 (1948), involving a murder prosecution, testimony that defendant "went with a revolver and used profane language and threatened to kill," held error because it merely showed defendant to be a man of temper. In murder prosecutions evidence of a prior shooting in self-defense is inadmissible. State v. Whigham, 60 Ohio App. 181, 20 N.E.2d 257 (1938).

tainly, acts not constituting a crime have doubtful relevance in proving an element of the crime charged. Moreover, evidence of less than a conviction seems to darken the already dim probative value of other-crimes evidence.

Instructions Under Section 2945.59

At common law, the trial court was under a duty to instruct the jury on the limited purpose of other-crimes evidence. Although section 2945.59 of the Ohio Revised Code is said to be merely declaratory of common law,[50] it has been held that the trial court is under no duty to give instructions as to the limited purpose of criminal history unless there is a specific request to do so by the defendant.[51] Thus, the jury may, in the absence of such instruction, consider the evidence for any purpose. However, trial courts generally give instructions in the absence of a specific request by the defendant. This attempt to cure or mitigate tacitly admits the presence of the prejudicial effect of other-crimes evidence. But, whatever the case, courts and legal writers express doubt as to the effectiveness of such curative instructions.[52]

Other-Crimes Evidence to Prove Intent

In a trial for a crime in which felonious intent must be proved, other-crimes evidence is admitted to show the purpose or mental state of the defendant in committing the crime charged. Admission is based on "probability"; that is, lack of guilty knowledge or possibility of accident may explain the crime for which the accused is presently being tried, but the recurrence of similar other crimes tends to lessen the probability that the crime charged was committed without guilty knowledge or by accident. Therefore, since admission is based on "probability," the other crimes must be similar in nature to the crime charged in order to have probative value.

Other-crimes evidence showing intent is generally admitted in two types of cases. First, it is held admissible in cases in which the defendant places the element of intent in issue by pleading accident or mistake.[53] Second, it is held admissible in cases in which proof of the crime charged in and of itself permits no inference of felonious intent. Thus, in prosecu-

50. Clyne v. State, 123 Ohio St. 234, 172 N.E. 767 (1931), *appeal dismissed,* 283 U.S. 810 (1932).

51. State v. Pope, 171 Ohio St. 438, 172 N.E.2d 9 (1961); State v. Hollos, 76 Ohio App. 521, 65 N.E.2d 144 (1944).

52. See Justice Jackson's remarks in Krulewitch v. United States, 336 U.S. 440, 453 (1959); Note, 54 COLUM. L. REV. 946, 965-67 (1954).

53. State v. Ensmunger, 149 Ohio St. 289, 77 N.E.2d 79 (1948) (practicing medicine without a license); State v. Berkman, 79 Ohio App. 432, 74 N.E.2d 411 (1944) (running a gambling room).

tions for possession or receipt of stolen goods,[54] forgery,[55] false representation,[56] soliciting bribes,[57] uttering counterfeit money,[58] and fraudulent sale of chattels[59] in which the state must prove "guilty knowledge," evidence of prior similar crimes is admissible. In the above types of cases, other-crimes evidence is legitimately relevant to show intent.

However, in trials for crimes where proof of the crime charged in and of itself necessarily establishes felonious intent, evidence of other crimes is not properly admissible. In such cases, the only possible effect of criminal history evidence is to prejudice the defendant by showing his criminal disposition.

In deciding whether other-crimes evidence is properly relevant to show intent, Ohio courts generally give the nature of the crime charged full consideration as a determinative factor. For example, in prosecutions for murder,[60] abortion,[61] and unlawful breaking and entering,[62] it has been held that other-crimes evidence is properly excluded in that the nature of the crime charged in and of itself permits an inference of intent.

Other-Crimes Evidence to Prove Motive

Motive, which has generally been defined as the inducing force which causes a person to commit a crime,[63] need not be proved to establish guilt. It is usually brought into issue, however, as an aid in establishing intent. Unlike using other-crimes evidence to show intent, it is not necessary for the other crime to be of the same nature as the crime charged, on the theory that "probability" is not a factor.

Other-crimes evidence is commonly used to show motive where the defendant commits the crime charged in an attempt to escape arrest, or prevent discovery of a former crime.[64] For example, in *State v. Ross*,[65]

54. State v. Pope, 171 Ohio St. 438, 172 N.E.2d 9 (1961). Some text authorities and courts would require the property to be of the same type, stolen from the same owner, or stolen by the same thief. RICHARDSON, EVIDENCE § 181 (8th ed. 1955). Ohio courts have not held these requirements to be absolute, suggesting that they are merely guidelines.

55. Richards v. State, 43 Ohio App. 212, 183 N.E. 36 (1932).

56. Coblentz v. State, 84 Ohio St. 235, 95 N.E. 768 (1911).

57. State v. Davis, 90 Ohio St. 100, 106 N.E. 770 (1914).

58. Reed v. State, 15 Ohio 217 (1846).

59. State v. Roberts, 131 N.E.2d 665 (Ohio Ct. App. 1955).

60. State v. Moore, 149 Ohio St. 226, 78 N.E.2d 365 (1948). *Contra,* Clyne v. State, 123 Ohio St. 234, 174 N.E. 767 (1931), *appeal dismissed,* 283 U.S. 810 (1932).

61. State v. Brown, 137 N.E.2d 609 (Ohio Ct. App. 1955) (evidence admitted on other grounds).

62. State v. Zidak, 91 Ohio App. 464, 108 N.E.2d 834 (1951) (evidence admitted on other grounds).

63. BLACK, LAW DICTIONARY 1164 (4th ed. 1951).

64. Shelton v. State, 106 Ohio St. 243, 140 N.E. 153 (1922) (murder prosecution where evidence admitted showing defendant a fugitive from justice); State v. White, 116 Ohio App. 522, 189 N.E.2d 160 (1962) (child stealing prosecution where evidence of prior sex acts admitted).

65. 92 Ohio App. 29, 108 N.E.2d 77 (1952).

the defendant was tried for fatally shooting a police officer; the court allowed evidence which showed the defendant had committed prior robberies on the theory that defendant's motive in shooting the police officer was to prevent discovery of those robberies. In such a case, the evidence is necessary to establish motive and is therefore properly admitted.

Some courts, however, have admitted other-crimes evidence under the guise of motive where the nature of the crime charged in and of itself permits a clear inference of the defendant's motive.[66] Thus, in trials for sex crimes, motive may be inferred from evidence establishing the occurrence of the crime charged and the defendant's connection therewith.[67] In this type of case, other-crimes evidence is only relevant to show defendant's criminal disposition.

Other-Crimes Evidence to Prove Plan or Scheme

Evidence establishing a defendant's plan or scheme in committing a series of crimes is not necessary to establish the crime charged. Showing a plan or scheme, however, is an aid in identifying defendant with the crime charged.[68] Evidence of other crimes committed by defendant in carrying out his plan is, therefore, relevant to "earmark" him as the perpetrator of the crime charged. Accordingly, the other crimes must be similar in nature to the crime charged and committed in a particular manner or by novel means.

In *Whiteman v. State*,[69] the supreme court considered the question of admitting evidence of other crimes to show a plan or scheme in committing the crime charged. There, the defendants had committed a series of robberies in a single neighborhood, all within a three week period. In each instance, the defendants had used a police car in addition to bus driver uniforms to deceive their victims. At trial for one of the robberies, the court admitted testimony from the other victims showing the similar aspects of the robberies. In upholding this admission, the court established three requirements for using other-crimes evidence to show plan or scheme in committing the crime charged. They are: (1) that all the crimes within the scheme must be committed within a short period of time;[70] (2) that they must be committed within the same locality;[71] and

66. State v. Bokien, 14 Wash. 403, 44 Pac. 889 (1896).

67. See notes 79, 80 *infra* and accompanying text.

68. Where defendant pleads alibi, courts have expressly declared other-crimes evidence admissible to show "identity." State v. Brown, 137 N.E.2d 609 (Ohio Ct. App. 1955); State v. Stamper, 85 N.E.2d 596 (Ohio Ct. App. 1953).

69. 119 Ohio St. 285, 164 N.E. 51 (1928).

70. The supreme court has never defined the period of time within which the crime must occur. However, a court of appeals has held "remoteness" to be *comparative*, thereby allowing the trial courts reasonable latitude in determining the question of remoteness. State v. Hopkins, 117 Ohio App. 48, 189 N.E.2d 636 (1962).

71. Although the supreme court has never defined the limits of "locality," two courts of

(3) that they must be committed pursuant to a particular method. In the similar case of *State v. Martin*,[72] another court upheld the admission of testimony showing that defendant had committed other robberies according to a plan.

In spite of the unique plans used by defendants in the *Whiteman* and *Martin* cases, it can still be argued that the evidence was relevant purely to show a *propensity* to commit crime, and not as an aid in proving identity. In *Whiteman,* both the victim of the robbery and his companion identified the defendants in direct testimony. In *Martin,* the defendant's partner in the charged robbery, testifying for the state, named defendant as participating in that crime. The state established a prima facie case in both instances on the basis of this testimony. Therefore, it is doubtful whether other-crimes evidence has any value other than to display the defendant's propensity to commit crime in cases where the prosecution has ample evidence of another type, such as direct testimony from the victim, to prove the defendant committed the crime charged.

Other-Crimes Evidence in Sex Crimes

As noted previously, the question of whether other-crimes evidence is relevant as substantive proof of the crime charged must be determined in light of: (1) the weight of other-crimes evidence in establishing the occurrence of the other-crime(s) and defendant's connection therewith, (2) the nature of the crime charged, and (3) the other types of evidence available to the prosecution. All bear directly on the question of whether other-crimes evidence is relevant as substantive proof of the crimes charged, or relevant only to show *disposition.* Ohio courts give little or no consideration to these factors in cases involving sex offenders. In addition, the courts go far beyond a literal interpretation of section 2945.59 of the Ohio Revised Code, and in some instances they completely disregard that section's specific exceptions in an effort to admit other-crimes evidence in sex cases.

Ohio is among the majority[73] of American jurisdictions which permit the prosecution to introduce evidence of other sex crimes committed by the defendant upon the prosecuting witness. However, the courts do not attempt to justify admission under any of the recognized statutory exceptions. Rather, in prosecutions for the so-called "consent" sex crimes,[74] they

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appeal have excluded evidence of prior crimes committed in other cities. State v. Hollos, 76 Ohio App. 521, 65 N.E.2d 144 (1944); State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (1943).

72. 191 N.E.2d 581 (Ohio Ct. App. 1961).

73. State v. Sauter, 125 Mont. 109, 232 P.2d 731 (1951) (prior acts with persons other than prosecutrix excluded); State v. Haney, 219 Minn. 518, 18 N.W.2d 315 (1945); Wilson v. Commonwealth, 265 Ky. 337, 96 S.W.2d 1026 (1936) (admitted upon condition that the trial court instruct that evidence was limited to identify or to corroborate).

74. Adultery, fornication, incest, seduction, and statutory rape are among the "consent"

admit other-crimes evidence for the specific purpose of showing the defendant's criminal disposition toward the prosecuting witness.[75] The courts take this position because they look upon prior criminal conduct between the prosecuting witness and the defendant as having a high probability of continuing up to and beyond the time of the commission of the crime charged.

Ohio courts, however, do not stop with admitting evidence of other sex crimes committed with the prosecuting witness; rather, they go beyond the majority position by admitting evidence of other sex crimes committed with persons other than the prosecuting witness. Various reasons are given to justify this position. For example, in a prosecution for incest with the defendant's daughter, one court upheld evidence of similar crimes committed by the defendant with his other daughter.[76] The court based its decision on the fact that the same relationship existed between the defendant and the second daughter as existed with the prosecuting witness. Similarly, the Ohio Supreme Court has upheld other-crimes evidence admitted to "identify" the defendant with the crime charged, where the defendant was charged with sodomy committed upon a six year old child.[77] Although the young victim identified the defendant as the perpetrator of the crime charged, testimony of six other children upon whom defendant had committed similar crimes was also admitted to identify the defendant. The court pointed out that "identity" in cases involving sex crimes is broader than physical characteristics; it also includes perverted character on the theory that sex deviates usually follow a particular pattern.[78] This liberal attitude in sustaining admission of other-crimes evidence in prosecutions for sex crimes goes far beyond the literal meaning of "identity."

Still other courts attempt to use motive as a basis for admission of other-sex-crimes evidence, declaring that such evidence is relevant to "reasonably disclose defendant's purpose" in committing the crime charged.[79] The validity of this position is, to say the least, doubtful, for in sex crimes the defendant's motive in committing the crime charged is obvious and can be readily inferred from proof of the crime charged in and of itself.[80]

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crimes. State v. Reineke, 89 Ohio St. 390, 100 N.E. 52 (1914) (incest prosecution where evidence of subsequent acts with prosecutrix admitted).

75. Boyd v. State, 81 Ohio St. 239, 90 N.E. 355 (1909) (statutory rape and evidence of prior acts with prosecutrix admitted).

76. State v. Jackson, 82 Ohio App. 318, 81 N.E.2d 546 (1948).

77. Barnett v. State, 104 Ohio St. 298, 135 N.E. 647 (1922).

78. *Ibid.*

79. State v. Harmon, 107 Ohio App. 268, 158 N.E.2d 406 (1958). (Emphasis added.) See also State v. Giles, 83 Ohio App. 39, 82 N.E.2d 132 (1948); State v. Jackson, 82 Ohio App. 318, 81 N.E.2d 346 (1948).

Using motive as a basis only conceals the true purpose of the evidence, which is to display before the jury the defendant's propensity to commit this type of crime. In spite of the various reasons given by the courts, language describing other-crimes evidence as showing "moral degeneracy"[81] or "perverted emotion"[82] indicates that the evidence is admitted for the sole purpose of showing criminal disposition.

At the present time, only Kansas and California[83] have *expressly* held evidence of prior sex crimes with persons other than the prosecuting witness to be admissible for the sole purpose of showing propensity to commit crime. But for all practical purposes, Ohio has joined this minority position. In a recent case involving a prosecution for sodomy, the trial court admitted testimony tending to show that defendant had committed similar crimes with other boys.[84] After all the evidence was presented, the court gave the following charge to the jury:

> [T]his evidence was allowed for whatever effect you determine it might have on the alleged moral disposition and perversity of the defendant, it being a theory of the law that a person who has indulged in similar conduct at other times to that alleged in the indictment is more likely to have that type of *moral disposition* to commit the act alleged than one who has not indulged in such acts.[85]

In upholding this charge, the Ohio Supreme Court has in effect sanctioned the admission of other-crimes evidence for the sole purpose of showing criminal disposition.

The primary reason for the liberal policy in this area is what jurists believe to be fact — recidivism.[86] Courts believe that sex offenders are more likely to "repeat" their crimes than are other criminals. However, this position is questionable. Statistics show that sex offenders are no more prone to "repeat" their crimes than other criminals.[87] Although sociologists and criminologists differ on this point, the majority of them indicate that recidivism is less among sex offenders.[88] In any event, the

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80. State v. King, 276 Ill. 138, 114 N.E. 601 (1916) (evidence not competent to show motive, when inferred from the act); State v. Sauter, 125 Mont. 109, 232 P.2d 731 (1951) (motive inferred from the act).

81. State v. Harmon, 107 Ohio App. 268, 158 N.E.2d 406 (1958).

82. State v. Jackson, 82 Ohio App. 318, 81 N.E.2d 546 (1948).

83. People v. Herman, 97 Cal. App. 2d 272, 217 P.2d 440 (1950); People v. Whiting, 173 Kan. 711, 252 P.2d 884 (1953).

84. State v. Shively, 172 Ohio St. 128, 174 N.E.2d 104 (1961).

85. *Id.* at 131, 174 N.E.2d at 106. (Emphasis added.)

86. Commonwealth v. Bowldon, 179 Pa. Super. 328, 116 A.2d 867 (1955).

87. Slough & Schwinn, *The Sexual Psychopath*, 19 U. KAN. CITY L. REV. 131, 137 (1951), citing a report by the Federal Bureau of Investigation on twenty-five types of crimes in which sex offenders placed seventeenth in a listing measuring recidivism.

88. *Compare* Commonwealth v. Bowldon, 179 Pa. Super 328, 341-44, 116 A.2d 867, 873-74 (1955) (discussing studies on this subject), *with* Trautman, *Logical or Legal Relevancy —A Conflict in Theory*, 5 VAND. L. REV. 385 (1952) (discussing conflicting authorities).